IN THE

Supreme Court of the United States

October Term, 1948

No. 399

WILLIAM DAVIDSON,
Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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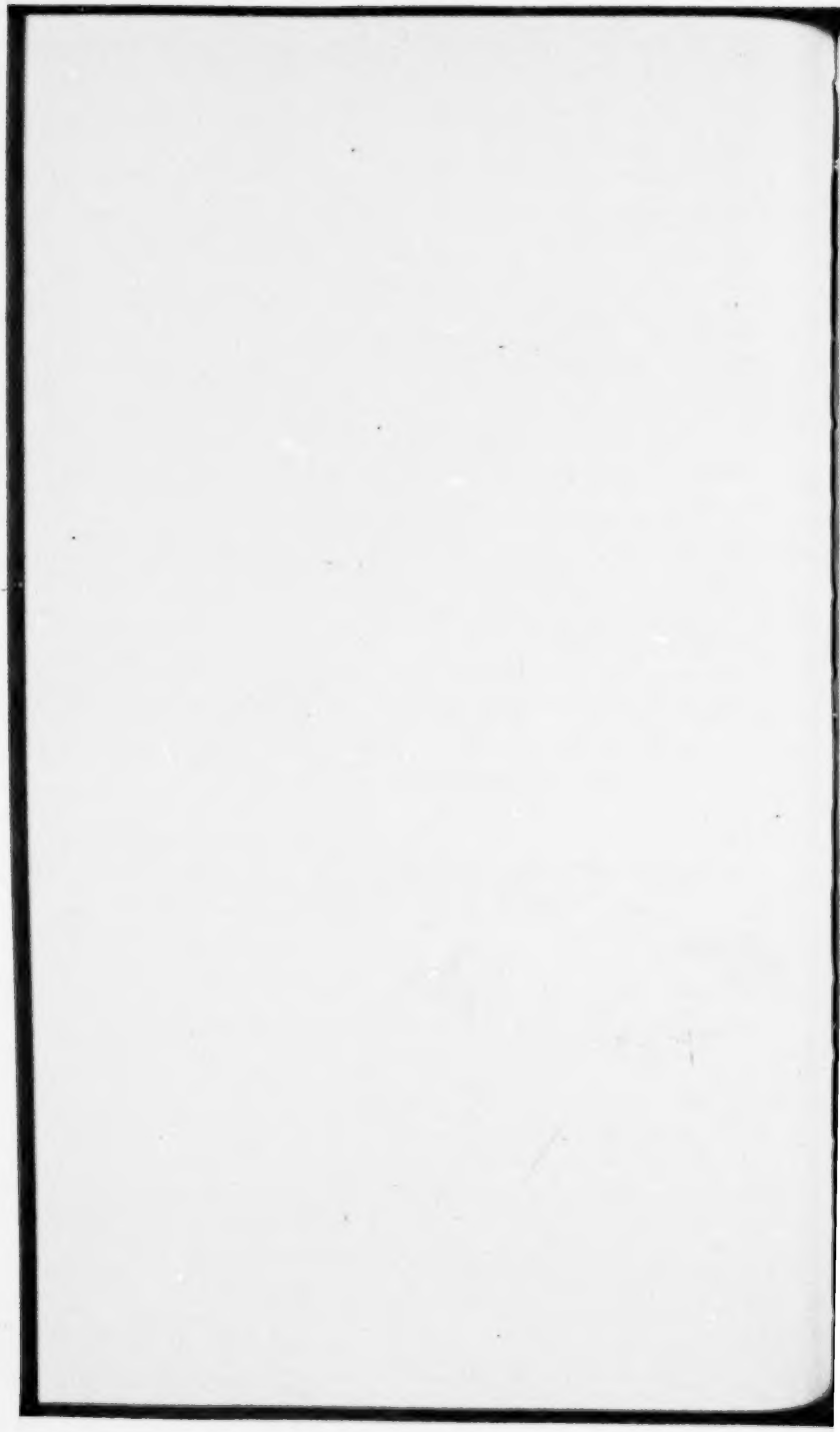

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PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petitioner, William Davidson, respectfully petitions this Honorable Court for a Writ of Certiorari to the Court of Appeals of New York.

Statement of the Matter Involved

This is a criminal action initiated in the County Court of Kings County, New York, against the petitioner who was indicted by the Grand Jury for the crimes of assault in the first and second degree.

The indictment charged petitioner, together with two co-defendants, with two counts of assault in the first degree

and four counts of assault in the second degree. The first count charged the petitioner and two co-defendants with the crime of assault in the first degree upon one James Davidson by aiming and discharging loaded revolvers at him with intent to kill (R. 6).

The second and third counts charged the petitioner and co-defendants with assault in the second degree upon the same individual (R. 6, 7).

The fourth count charged the petitioner and co-defendants with the crime of assault in the first degree upon the person of one Raymond Barnes by aiming and discharging loaded revolvers at him with intent to kill (R. 7).

The fifth and sixth counts charged the petitioner and co-defendants with the crime of assault in the second degree upon the same individual (R. 7, 8).

The trial began on November 25, 1946, and concluded on November 26, 1946.

At the opening of the trial, the court granted a motion by the prosecutor to sever the indictment as to the co-defendant Roccoforte (R. 30) as well as a motion to amend counts one, two and three of the indictment, to charge the commission of the crime of assault upon the person of James Daniels instead of James Davidson.

The amendment of the indictment was granted before a juror was called for examination, and occurred in the following sequence (R. 30, 31):

> "Mr. Cone: I also have another motion to offer the court. With reference to counts one and three I move the court at this time that the name of the person mentioned as James Davidson be amended to read James Daniels.
>
> The Court: Any objection?
>
> Mr. Brodsky: No objection.

Mr. Fischbein: No objection.
The Court: All right. Put the jury in the box.
Mr. Cone: If your Honor pleases, with reference to the amendment of the indictment, I meant also to include Count No. 2 of the indictment.
The Court: Any objection?
Mr. Brodsky: No objection.
Mr. Fischbein: No objection.
The Court: So ordered."

At the conclusion of the case the trial court instructed the jury that it could find the petitioner not guilty, or guilty as charged, or guilty of one or more counts with reference to the assault upon the person of James Daniels (counts 1, 2 and 3 as amended) (R. 308), and not guilty, or guilty as charged, or guilty of one or more counts in the indictment with reference to the assault upon the person of Raymond Barnes (counts 4, 5 and 6) (R. 309). The jury rendered a single verdict of guilty as charged which constituted, in law, a conviction of the highest crime for a single offense charged in several counts in the indictment.

The trial court, however, construed the verdict as a finding of guilty upon each count of the indictment for it imposed a sentence of five to ten years with an additional term of five to ten years for being armed on the first count; a total of ten to twenty years. On each of the second and third counts petitioner was sentenced to a term of two and one-half to five years with an additional term of five to ten years for being armed, each of these sentences to run concurrently with the sentence on the first count. On the fourth count petitioner was sentenced to a term of five to ten years with an additional five to ten years for being armed, said sentence to run consecutively with the sentence imposed on the first count. On each of the fifth and sixth counts of the indictment, petitioner was sentenced to a term of two and one-half to five

years for being armed, said sentences to run concurrently with the sentence imposed on the fourth count of the indictment. The aggregate sentence thus imposed was a term of twenty to forty years (R. 338, 339).

The Appellate Division also construed the verdict as a finding of guilty upon each count of the indictment for it set aside the four counts charging assault in the second degree and affirmed the conviction as to the two counts charging assault in the first degree (R.).

In the Court of Appeals of New York it was the contention of petitioner's counsel that the People's proof established the commission of a single assault in that the bullets which struck bystanders Daniels and Barnes were fired at the same time as part of the same transaction, with a single intent, i. e., to kill Brown, the individual with whom petitioner had had a previous altercation.

The Court of Appeals rejected this argument and affirmed the judgment with no opinion, Fuld, *J.*, dissenting, "That the imposition of two additional sentences for being armed should be modified by annulling the additional sentence of five to ten years under the fourth count."

A motion for reargument was made in person to the Court of Appeals and petitioner contended (1) that the trial court had no power to amend counts one, two and three of the indictment prior to the trial and that such amendment abridged petitioner's liberty without due process of law under the 14th Amendment to the Federal Constitution, by depriving him of advance notice of a charge not embraced in the indictment when presented by the grand jury; and (2) that the verdict of guilty as charged rendered by the jury constituted, under New York law, a conviction of the highest count for a single offense charged

in several counts in the indictment and, therefore, the imposition of two separate and consecutive sentences was illegal, as petitioner could receive but a single sentence appropriate to the highest count in the indictment; and (3) that the verdict of guilty as charged was improper and failed to reveal with certainty whether conviction ensued for the assault upon Daniels (counts 1, 2 and 3) or Barnes (counts 4, 5 and 6), since on an indictment charging two or more crimes a defendant may be acquitted or convicted of one or more crimes charged, and, if the case be tried before a jury, the foreman must declare each crime of which the defendant is convicted (New York Code of Criminal Procedure, Section 443-A, Laws of 1936).

Reargument was denied by the Court of Appeals of New York on July 16, 1948 and constitutes a final judgment by the highest court in the state in which decision could be rendered so that all remedies in the state courts have been exhausted.

Two questions were involved which petitioner contends were decided in violation of his constitutional rights under the fifth and fourteenth amendments to the Federal Constitution.

The first contention to this court is that the amendment of counts one, two and three of the indictment prior to trial compelled the petitioner to stand trial upon the prosecutor's accusation that he had assaulted James Daniels and constituted a trial without an indictment, which cannot be waived, and the second is that the trial court had no power to amend the indictment prior to trial and charge the commission of the crime upon the person of Daniels instead of Davidson, without resubmission of the case to

the grand jury, abridged petitioner's liberty without due process of law and deprived him of advance notice of a charge not embraced in the indictment when returned by the grand jury.

The third contention is that the imposition of separate consecutive sentences under the first and fourth counts of the indictment violates the double jeopardy clause of the 5th Amendment to the Federal Constitution, in that the verdict of guilty as charged constituted, in law, a conviction for a single offense upon which petitioner could receive but a single sentence appropriate to the highest count in the indictment, and the fourth is that the verdict in the words guilty as charged is improper and incomplete and fails to reveal with sufficient certainty whether conviction ensued for the assault against Daniels (counts 1, 2 and 3 as amended) or Barnes (counts 4, 5 and 6), in that on an indictment which charges two or more separate crimes, it is the duty of the foreman of the jury to declare each crime of which the defendant is convicted (New York Code of Criminal Procedure, Section 443-A, Laws of 1936).

This Court Has Jurisdiction

The Federal constitutional issues are properly preserved. Petitioner preserved the Federal constitutional question regarding the legality of separate consecutive sentences based on the verdict rendered by the jury of guilty as charged, by filing briefs in the Appellate Division and Court of Appeals of New York on the original appeal as well as by motion for reargument to the latter court. Petitioner also preserved the Federal constitutional question by motion for reargument to the Court of Appeals regarding the legality of the amendments of

counts 1, 2 and 3 of the indictment, and of compelling him to stand trial on an information laid by the prosecutor, by reason of such amendment. A New York decision of the Court of Appeals holds that trial on an information for an infamous crime is unconstitutional.

People *ex rel.* Battista v. Christian, 249 N. Y. 314, 164 N. E. 111.

This court has granted a writ of certiorari to a state court where a petitioner has been deprived of his liberty without due process.

Smith v. O'Grady, etc., 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859.

Ward v. State of Texas, 316 U. S. 547, 62 S. Ct. 1139, 86 L. Ed. 1663.

Also the writ of certiorari has been granted where a plea of double jeopardy has been denied by a state court.

Dryer v. Illinois, 187 U. S. 86, 23 S. Ct. 28, 47 L. Ed. 79.

Robertson v. Baldwin, 165 U. S. 281, 17 S. Ct. 326, 41 L. Ed. 715.

This court has jurisdiction to grant the write of certiorari under Section 237 of the Judicial Code, as amended (28 U. S. Code Ann. 344 (B)).

The Questions Presented

The questions presented to this court are: 1. Whether petitioner was denied due process of law under the Federal Constitution when, prior to the trial, Counts 1, 2 and 3 of the indictment were amended by the court, to charge the commission of the crime of assault upon the person of one James Daniels, instead of James Davidson as originally charged by the grand jury, without proof that

petitioner had ever committed a crime against Daniels and without submitting the case anew to the grand jury, thereby convicting him without advance notice of a charge not embraced in the indictment when founded by the grand jury. 2. Whether petitioner was placed in double jeopardy and denied due process of law under the 5th and 14th amendments to the Federal Constitution when separate and consecutive sentences were imposed upon him by reason of a single verdict of guilty as charged, which constituted, in law, a conviction for a single offense charged in several counts in the indictment, on which verdict he could receive but a single sentence appropriate to the highest count in the indictment. 3. Whether petitioner was placed in double jeopardy and denied due process of law under the 5th and 14th amendments when separate consecutive sentences were imposed upon him on a single verdict of guilty as charged which constituted an incomplete and improper verdict by reason that when an indictment charges two or more separate crimes, the foreman of the jury must, according to law, declare each crime of which the defendant is convicted.

Reason for Allowance of Writ

The Court of Appeals of New York did not follow the precedent of its own court and of the U. S. Supreme Court and of other federal courts and state courts of other jurisdiction in its determination of the questions presented herein under the Federal Constitution.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this court, directed to the Court of Appeals of New York, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Court of

Appeals had in the case entitled People of the State of New York, respondent, against William Davidson, defendant-appellant, to the end that this cause may be reviewed and determined by this court as provided for by statutes of the United States; and that the judgment of said Court of Appeals of New York be reversed by the court, and for such further relief as to this court may seem proper.

Respectfully submitted,

WILLIAM DAVIDSON,
Petitioner.

Dated: September , 1948.

APPENDIX

The Decisions of the Court of Appeals

On April 22, 1948, the Court of Appeals affirmed the judgment with no opinion, Fuld, J., dissenting with the following memorandum:

> "On August 3, 1946, defendant fired his revolver once, and then immediately after, at least once again and as a result wounded two persons. He was properly adjudged guilty of two separate crimes of assault in the second degree. For those offenses the trial court imposed two sentences of imprisonment for indeterminate terms of five to ten years in state prison—to run consecutive. The imposition of such consecutive sentences are fully warranted. In addition to the sentences referred to, the trial court also imposed in connection with each of the simultaneously committed assaults an extra 'five to ten years additional for use of a revolver pursuant to Section 1944 of the Penal Law,' and directed that such further sentence also 'run consecutively'.
>
> I am unable to agree with the judgment of this court insofar as it affirms the imposition of both these additional sentences. All recognize that the result is harsh; in my view, it is not only harsh but unauthorized.
>
> In my judgment, the statute (Penal Law, Section 1944) was never designed to cover a situation such as here presented and to permit the imposition of separate additional punishments—of increased imprisonment of five to ten years—where the crimes were committed simultaneously. The judgment should be modified by voiding and annulling the additional punishment of five to ten years imposed for the commission of the crime charged in the fourth count."

Reargument was denied by the Court of Appeals on July 16, 1948, with no opinion.

> "A motion for re-argument of the above cause being duly made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:
>
> Ordered, that the said motion be and the same hereby is denied."

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Decision of the Court of Appeals of New York

The decision of the Court of Appeals of New York is annexed to the petition for writ of certiorari, with dissenting opinion of Fuld, J., and was rendered by said court on April 22, 1948. A motion for reargument was denied by said court on July 16, 1948, with no opinion.

II

Jurisdiction

1. The statutory provision which is believed to sustain the jurisdiction of this court is Section 237 of the Judicial Code, as amended (28 U. S. Code Ann. 344 (B)).

2. The Federal Constitution issues which have been preserved were decided by the Court of Appeals of New York in a manner which petitioner contends abridges his rights under the 5th and 14th amendments to the United States Constitution as set forth more fully in the petition.

3. The cases believed to sustain said jurisdiction are as follows:

Smith v. O'Grady, etc., 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859.

Ward v. State of Texas, 316 U. S. 547, 62 S. Ct. 1139, 86 L. Ed. 1663.

Bohanan v. Nebraska, 118 U. S. 231, 6 S. Ct. 1049, 30 L. Ed. 71.

Hansberry v. Lee, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22.

III

Statement of the Case

Two issues preserved throughout the case and two issues preserved by timely motion for reargument to the Court of Appeals of New York are presented in the petition.

a.

The first concerns the point of whether the amendments of Counts 1, 2 and 3 of the indictment before a trial was had deprived petitioner of an indictment of a grand jury, which cannot be waived.

This issue arose in the County Court of Kings County, New York. The petitioner was charged by an indictment of the grand jury with the commission of the crime of assault committed upon the person of one James Davidson (Counts 1, 2 and 3). At the opening of the trial, before a juror was called, the court, on the motion of the prosecutor, and without objection on the part of counsel for petitioner, amended Counts 1, 2 and 3 of the indictment to charge the commission of the crime of assault as committed upon the person of James Daniels, instead of James Davidson, without proof that petitioner had ever committed such a crime (R. 30, 31).

This issue was pleaded by a motion for reargument to the Court of Appeals, wherein petitioner contended that the trial court had no statutory power to amend the indictment prior to the trial and constituted a denial of due process of law under the due process clause of the 14th Amendment to the Federal Constitution.

b.

The second concerns the legality of the amendments of the First, Second and Third Counts of the indictment and

the subsequent conviction of petitioner without advance notice for a crime different than that embraced in the indictment as founded by the grand jury and whether that constitutes a conviction of petitioner without due process of law.

This issue was pleaded by motion for reargument to the Court of Appeals as constituting a trial without an indictment of a grand jury and a conviction had without sufficient notice and that such procedure constituted a conviction of petitioner without due process of law under the 14th Amendment.

c.

The third concerns the imposition of separate consecutive sentences under the First and Fourth Counts of the indictment upon a single verdict of guilty as charged which verdict constituted a conviction for a single offense charged in several counts in the indictment upon which petitioner could receive but one sentence appropriate to the highest count in the indictment.

Throughout the appeals in the state courts petitioner's counsel contended that, as a matter of law, there was but one assault. Such argument was based on the fact that the bullets which struck bystanders Daniels and Barnes were fired at the same time as part of the same transaction, with a single intent, *i. e.*, to kill Brown, the individual with whom the People contended had had a previous altercation with the petitioner. The Court of Appeals rejected this argument, however, and issue c was pleaded to the Court of Appeals as constituting double jeopardy in violation of the 5th Amendment to the Federal Constitution.

d.

The fourth concerns the validity of the single verdict of guilty as charged as rendered by the jury and the separate consecutive sentences imposed thereunder as a verdict which fails to reveal with sufficient certainty the crime or crimes of which petitioner has been convicted and is improper, incomplete and contrary to law by reason of the fact that on an indictment which charges two or more separate crimes the foreman of the jury must declare each crime of which the defendant is convicted.

This issue was pleaded by motion for reargument to the Court of Appeals as constituting a denial of due process of law and the equal protection of the law as embodies in the 14th Amendment to the Federal Constitution.

IV

Specification of Errors

The Court of Appeals of New York erred in not granting reargument and reversing the judgment of conviction of the Kings County Court. It erred in not holding that the power of the trial court to amend an indictment is limited to form and permissible only upon the trial. It erred in not holding that counts 1, 2 and 3, of the indictment as amended, constituted merely the prosecutor's accusation that such a crime as created by the amendment had been committed. It erred in not holding that the subsequent conviction of petitioner without sufficient and advance notice for a crime than that charged in the indictment violated the due process clause of the Federal Constitution. It erred in not holding that the verdict of guilty as charged constituted a conviction for a single crime and that petitioner

could receive but a single sentence appropriate to the highest count in the indictment therefor. It erred in not holding that the verdict of guilty as charged was contrary to law and did not inform petitioner of which crime he was convicted and violated the due process clause of the 14th Amendment to the Federal Constitution.

V

Summary of the Argument

POINT I

a.

The Court of Appeals misapplied the well established rule that the power of the trial court to amend the indictment of the grand jury is limited to form and permissible only upon the trial when a variance between the allegation and the proof shall appear and violated the due process clause of the 14th Amendment to the Federal Constitution.

b.

The Court of Appeals by denying petitioner's motion for reargument has held valid the amendments of counts 1, 2 and 3 of the indictment and not only violated the due process clause of the 14th Amendment which requires that a defendant be informed in advance of that for which he stands accused, but is contrary to its own interpretation of the law in the case, that no person shall be held to answer for a capital or otherwise infamous crime unless on indictment of the grand jury.

POINT II

a.

The Court of Appeals by its decision denying reargument has abrogated the well founded rule that a verdict of guilty as charged constitutes a conviction for a single crime upon which petitioner could receive but a single sentence appropriate to the highest count in the indictment and violated the double jeopardy clause of the 5th Amendment to the Federal Constitution.

b.

The Court of Appeals by denying reargument has disregarded the mandate of the Legislature of the State of New York that on an indictment charging two or more separate crimes the foreman of the jury must declare each crime of which the defendant is convicted and violated the due process clause of the 14th Amendment to the Federal Constitution.

ARGUMENT

Point I

A.

The Court of Appeals misapplied the well established rule that the power of the Trial Court to amend the indictment of the Grand Jury is limited to form and permissible only upon the trial when a variance between the allegation and the proof shall appear and violated the due process cause of the 14th Amendment to the Federal Constitution.

In the case at bar we are wholly in the dark and left to conjecture on the question of whether the amendments

of counts 1, 2 and 3 as made prior to the trial was for one of form or for one of substance. It may well be that several persons were victims of the alleged shooting, among them James Daniels, and yet the evidence at the inquest of the grand jury may have been insufficient to justify the Grand Jury in finding a true bill of indictment against petitioner for that crime. And Daniels, it is well to point out, identified the co-defendant Goldberg (against whom the case was dismissed at the close of the People's case R. 10) and his attorney, Abraham H. Brodsky, on the trial, as the men who did the shooting (R. 186, 187).

Inasmuch as the record affirmatively shows that counts 1, 2 and 3 of the indictment were amended prior to the trial (R. 30, 31), it is urged that the procedure was unauthorized by statute and deprived petitioner of an indictment of a grand jury under the provisions of Article 1, Section 6 of the New York State Constitution.

Section 254 of the Code of Criminal Procedure of New York says an indictment is, "an accusation in writing, presented to a competent court, charging a person with a crime;" it is a finding upon oath (id. Secs. 245, 247; and depends upon this fact, among others, for its validity.

People v. Steinhardt, 47 Misc. 252, 256.
People v. Ross, 52 Hun. 33, 36-37.
Joyce on Indictment (2nd. Ed.) 135.

In some jurisdiction, including New York, statutes have been enacted allowing amendments to indictments in matters of form and in certain particulars, under prescribed conditions.

In New York, section 293 of the Code of Criminal Procedure provided as follows:

> "upon the trial of an indictment, when a variance between the allegation therein and the proof, in respect

to time, or in the name or description of any place, person or thing, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merit, direct the indictment to be amended, according to the proof, on such terms as to the postponement to the trial, to be had before the same or another jury, as the court may deem reasonable."

The above section, however, as well as the sections following 293, clearly refer to an amendment in matter of form and are expressly limited to variance between the allegation and the proof appearing in the course of trial, and unquestionably do not embrace an amendment of an indictment prior to the trial, as in the case here.

We thus have seen that the statutory power of the trial court to amend an indictment prior to the trial is non existant, and since the right to amend is purely statutory, it follows, under elementary principle of statutory construction (People v. Crundy, 218, N. Y. App. Div. 542, 543), that the statutory provisions must be strictly followed and adhered to and may be exercised when, upon the trial, a variance between the allegation and the proof shall appear.

Hence, in the absence of statutory grant pemitting an amendment of an indictment prior to the trial, the question raised can only be determined by recourse to the procedure followed under the common law.

At common law an indictment could not be amended by the court or the prosecuting officer without the concurrence of the grand jury which presented it.

Ex Parte Bain, 121 U. S. 1, 8.
People v. Motello, 157, N. Y. App. Div. 510, 511.
People v. Herman, 45 Hun. 175, 177.

In the case of Com. v. Drew, 3 cush. 279, the court said:

> "Where it is found that there is some mistake in an indictment, as a wrong name, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment, avoiding the defects of the first."

B.

The Court of Appeals by denying petitioner's motion for reargument has held valid the amendments of Counts 1, 2 and 3 of the indictment and not only violated the due process clause of the 14th Amendment which requires that a defendant be informed in advance of that for which he stands accused, but is contrary to its own law of the case, that no person shall be held to answer for a capital or otherwise infamous crime unless on indictment of a Grand Jury.

In considering this question, it will be convenient to recall the actual facts.

The petitioner was charged by indictment of the grand jury with the commission of the crime of assault upon the person of James Davidson (R. 6, 7). On the morning of the trial, before a juror was called for examination, counts 1, 2 and 3 of the indictment were amended by the court, without objection on the part of petitioner's conusel, to charge the commission of the crime therein as committed upon the person of James Daniels, instead of James Davidson, without proof that petitioner had ever committed such crime. Immediately thereafter a jury was sworn in and the trial commenced and petitioner found guilty as charged.

As amended, petitioner contends, the indictment ceased to be an indictment of a Grand Jury, insofar as charging

the petitioner with the crime of assault against James Daniels was concerned, and merely constituted the prosecutor's accusation that petitioner had committed such a crime. Petitioner, however, could not lawfully be placed on trial upon the information as laid by the prosecutor and trial court.

People ex rel. Battista v. Christian, 249 N. Y. 314, 164 N. E. 111.

People v. Trank, 88 App. Div. 294 85 N. Y. Supp. 55.

People v. Campbell, 4 Parker, Crim. R. 387.

The principle that no person shall be put on trial for an infamous crime unless on indictment of a grand jury, has been regarded as one of the securities of civil liberty, and is embodied among the fundamental provisions of the Federal and New York State Constitution.

Ex Parte Bain, 121 U. S. 1, 10, 13, 7 S. ct. 781, 30 L. Ed. 849.

People ex rel. Battista v. Christian, 249 N. Y. 314, 164 N. E. 111.

The institution of the grand jury has been said by high authority to be one of the barriers between the liberties of the people and the prerogatives of the crown. 4 Bl. Com. 349. The interposition of a body of competent citizens to inquire of offenses between the individual and the state, and the finding of a formal accusation upon such inquiry, before he can be put upon his trial for an infamous crime, forms the substance of the right guaranteed by the law of England and by the Constitution of the State of New York.

As early as 1886, this court, in Ex Parte Bain supra, in reaching the conclusion that a conviction founded on an indictment, which had been amended by the trial court, could not stand, said:

> "Any other doctrine would place the rights of a citizen which were intended to be protected by the constitution at the mercy or control of the court or prosecuting attorney; for if it once be held that changes can be made by consent or order of court in the body of the indictment as presented by the grand jury and the prisoner can be called upon to answer to the indictment as thus charged the restriction which the constitution places upon the power of the court, in regards to prerequisite of an indictment, no longer exists."

Section 222 of the Code of Criminal Procedure which provided for trial on an information for capital or otherwise infamous crime, was held void by the Court of Appeals of New York, as in conflict with Article 1, Section 6 of the State Constitution which requires indictment of a grand jury in such cases, and cannot be waived.

People ex rel. Battista, supra.

In People v. Miles, 289 N. Y. 36, the same court held that the amendment of the indictment by the addition of a new court violated the provisions of Article 1, Section 6 of the State Constitution and required reversal of the conviction thereunder and that the consent of the accused did not constitute a waiver of his constitutional rights.

In the instant case the trial court exercised the function of the grand jury and amended counts 1, 2 and 3 of the indictment by striking therefrom the person of James Davidson and inserting in place thereof the person of James Daniels. In effect, this amendment changed substantially the indictment founded by the grand jury, especially that the record contains no justifiable reason for the amendment. The principle violated rests, however, not only upon the effect of the amendment, but upon the fact that the indictment was amended, and the indictment therefor, as pointed out in Ex Parte Bain, supra, is no longer that of the

grand Jury and consequently constituted a violation of Article 5 of the Federal Constitution.

The trial court and the Court of Appeals of New York insouciance to the provisions of Article 1, Section 6 of the State Constitution and the 5th and 14th Amendments to the Federal Constitution is emphasized by its failure to require the indictment to inform the petitioner of that for which he stands accused without advance notice of a crime not embraced in the indictment when found by the grand jury.

Point II

A.

The Court of Appeals by its decision denying reargument has abrogated the well founded rule that a verdict of guilty as charged constitutes a conviction for a single crime upon which petitioner could receive but a single sentence appropriate to the highest count in the indictment and violated the double jeopardy clause of the 5th Amendment to the Federal Constitution.

The indictment charged petitioner with two counts of assault in the first degree and four counts of assault in the second degree (R. 6-8). All counts arising out of the same transaction.

It is every day's practice to charge a felony in different ways in several counts for the purpose of meeting the evidence as it may come out upon the trial. "Every cautious pleader will assert as many counts as will be necessary to provide for every possible contingency in the evidence and this the law permits" (Wharton Crim. Law, sec. 424). In New York State this practice is directly authorized by

statute. (Code of Crim, Pro. sec. 279.) Although each of the counts on the face of the indictment purports to be for a distinct and separate offense and the jury very frequently finds a general verdict of guilty of charged, only one offense is proved, and such verdict is sufficient to convict of the highest crime charged in the several counts thereof. (Miller v. People (1881), 25 Hun. 473.)

In the instant case the petitioner was found guilty, in the words "as charged" (R. 319). The court accepted the verdict of the jury over the protest of petitioner's counsel that it was contrary to law (R. 320); it recognized the verdict as a finding of guilt as to each crime in the indictment and imposed separate consecutive sentences on the first and fourth counts charging assault in the first degree as well as additional sentences under those counts for committing a crime while armed (R. 338, 339). The aggregate sentence thus imposed was a term of twenty to forty years (R. 339).

In imposing separate consecutive sentences the court was clearly in error and placed the petitioner in jeopardy twice upon a general verdict of guilty as charged, which constituted, in law, a conviction of the highest crime for a single offense charged in several counts in the indictment (People v. Miller, *supra*). Under the verdict, petitioner could receive but a single sentence appropriate to the highest count in the indictment.

People *ex rel.* Ling v. Morhous, 40 N. Y. S. 2d 649.
People v. Kern, 7 App. Div. 535, 40 N. Y. S. 243.
People v. Dileo, 194 App. Div. 793, 186 N. Y. S. 156.
Polinsky v. People, 73 N. Y. 65.
People v. Dunn, 90 N. Y. 104.

B.

The Court of Appeals by denying reargument has disregarded the mandate of the Legislature of the State of New York that on an indictment charging two or more separate crimes the foreman of the jury must declare each crime of which the defendant is convicted and therefor violated the due process clause of the 14th Amendment to the Federal Constitution.

The indictment under which the petitioner was tried was found upon the assumed authority of Section 279 of the Code of Criminal Procedure of New York, effective April 9, 1936.

Prior to this enactment it was a primary rule of criminal law in New York State, that a defendant could not be called upon to defend himself against two or more separate crimes at the same time, before the same jury. The right was one settled from the earliest history of the common law. The trial of a defendant upon separate and distinct felonies before the same jury was wholly unknown. Different felonies could only be charged in the same indictment, provided they arose out of the identical transaction.

Polinsky v. People, 73 N. Y. 64.
Hawker v. People, 75 N. Y. 487.

Expressing the law as it existed until April 9, 1936, is the case of People v. Goldner, 70 Misc. 199, wherein the court expressed the doctrine that an indictment must charge but one crime:

> "The command of the Code of Criminal Procedure is that the indictment must charge but one crime (sec. 278). And, while by the next section (279) this crime may be charged in separate counts to have been committed in a different manner or by different means, it must fairly appear that the separate counts relate to one and the same transaction."

On April 9, 1936, section 279 of the Code of Criminal Procedure was repealed and in place thereof there was enacted a new section 279, which provided as follows:

> "When there are several charges for the same act or transaction, constituting different crimes or the same crime alleged to have been committed in a different manner or by different means, or for two or more acts or transactions connected together or constituting parts of a common scheme or plan, or for two or more acts or transactions constituting crimes of the same or similar character, instead of having several indictments or informations, the whole may be joined in one indictment or information. The whole may be joined in one indictment or information in separate counts, and if two or more indictments or information are found in such cases, the court may order them to be consolidated; provided, however, that where the charges involve two or more acts or transactions constituting crimes of the same or a similar character which are neither connected together nor parts of a common scheme or plan, the court, in the interest of justice and for good cause shown may, in its discretion, order that the different charges set forth in the indictments or informations, be tried separately. The joinder or consolidation of indictments or informations shall not be prevented by the fact that different penalties may be imposed for conviction upon the several crimes charged." (Added Laws 1936, Chapter 328)

On April 9, 1936, the Legislature, by Chapter 328, enacted section 443-A of the Code of Criminal Procedure, which provides as follows:

> "On an indictment or information charging several crimes in separate counts, the defendant or defendants may be convicted or acquitted of one or more of the crimes charged; and, if the case be tried before a jury, the foreman shall declare each crime of which the defendant or defendants are convicted. A verdict of acquittal on one or more counts shall not be deemed an acquittal on any other counts." (Added Laws of 1936, Chap. 328, sec. 4, effective April 9, 1936.)

At the outset, it is to be noted, that while the Legislature permitted the joining of two or more separate crimes in the same indictment (section 279, effective April 9, 1936), it also provided that when crimes were thus joined, the defendant or defendants are entitled to separate verdicts upon each crime charged therein (section 443-A, effective April 9, 1936). This rule is understandable when it is considered that a general verdict of guilty as charged constitutes a conviction of the highest crime for a single offense charged in several counts in the indictment (Miller v. People (1881), 25 Hun. 473); and that a general verdict of guilty as charged is improper and incomplete where the defendant is charged with two separate crimes, as two separate issues are presented to the jury, and he has the right to have his guilt determined on both crimes separately (People v. King (1926), 216 App. Div. 240, 214 N. Y. S. 537, appeal dismissed, 243 N. Y. 554).

In the instant case the trial court instructed the jury to render two verdicts of guilty as charged, if the petitioner were guilty of both crimes of assault. It charged the jury that it could find the petitioner not guilty, or guilty as charged, or guilty of one or more counts in connection with the assault of Daniels (counts 1, 2 and 3, as amended), and not guilty, or guilty as charged, or guilty of one or more counts in connection with the assault of Barnes (counts 4, 5 and 6) (R. 308, 309). These instructions were consistent with the provisions of Section 443-A of the Code of Criminal Procedure. The jury, however, returned a single verdict of guilty as charged, without specification of whether the petitioner were guilty of the assault of Daniels, or of the assault of Barnes (R. 319), and counsel moved the court to set aside the verdict "as contrary to the provisions of the Code of Criminal Procedure"

(R. 320). This motion fully complies with the provisions of Section 465 of the Code of Criminal Procedure, sub-division 6, which provides that the trial judge, upon the application of the defendant, may grant a new trial, "when the verdict is contrary to law." The court denied the motion, and, as heretofore stated, construed the verdict as a finding of guilt as to each crime in the indictment and imposed separate consecutive sentences on the first and fourth counts as well as additional sentences under those counts for committing the crime while armed. In accepting the verdict and imposing the sentences it did on the petitioner, the court was clearly in error, and failed to distinguish between a general verdict, a verdict of guilty as charged on all counts in the indictment, and an incomplete verdict.

1. A general verdict in the words guilty as charged of the offense charged in the indictment is sufficient to convict of the highest crime *for a single* offense charged in several counts thereof (Miller v. People (1881) 25 Hun. 473), upon which the defendant could receive but a single sentence appropriate to the highest count in the indictment (People *ex rel.* Ling v. Morhous, 40 N. Y. S. 2d. 649).

2. Where the defendant was charged with separate crimes of burglary and larceny in the same indictment and the court properly instructed the jury to consider separately the counts in the indictment and the jury found a verdict of "Guilty as charged *on all counts,*" such verdict did not constitute a general verdict but a conviction of all crimes charged therein. People v. Richards, 33 N. Y. S. 2d. 860.

3. Where the defendant is charged with the possession of two revolvers in the same indictment, a general verdict of guilty as charged is improper for two separate crimes and two separate issues are presented to the jury, and he has the right to have his guilt determined on both crimes

separate. People v. King (1926), 216 App. Div. 240, 214 N. Y. Supp. 537, appeal dismissed 243 N. Y. 554; Code of Criminal Procedure, Section 443-A.

In the present case the verdict of guilty as charged is improper and leaves uncertain whether the petitioner is guilty of the assault against Daniels, or guilty of the assault against Barnes.

The petitioner was entitled, as a matter of law, to have his guilt determined on both crimes separately as well as a declared verdict of the foreman of the jury, informing him of each crime of which he is guilty. The life and liberty of petitioner cannot be made the subject of any speculation of which crime he is convicted. It is the law that "no person can be punished for a crime except upon a legal conviction in a court having jurisdiction thereof" (N. Y. Code of Crim. Pro., Sec. 3).

In conclusion it is urged that the verdict of the jury is improper and contrary to the law of the State of New York, the result of which has deprived petitioner of due process of law and the equal protection of the law under the provisions of the 14th Amendment to the Federal Constitution.

Respectfully submitted,

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APPENDIX

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval Forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment
(in part)

"Section 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitution

Article One

"Section 6. No person shall be held to answer for a capital or otherwise infamous crime * * * unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil action and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him * * *"

Section 222 of the Code of Criminal Procedure.

"All crimes prosecuted * * * must be prosecuted by indictment."